Admin. September 27, 2005

First Supplement to Memorandum 2005-29

New Topics and Priorities (Additional Material from Sam Shabot)

As additional support for his request that the Commission study the concept of forced heirship, Sam Shabot has provided the attached letter from Prof. Vincent Rougeau of the University of Notre Dame Law School.

Prof. Rougeau summarizes a recent article he has written on the legal concept of *legitime* in Louisiana — the practice of giving "all children (regardless of age, but subject to some limited exceptions) a permanent claim on a portion of their parents' estates by limiting the amount of an estate that could be disposed of by will." As Prof. Rougeau notes, in the late 1990s "this legal concept was severely undermined in Louisiana in the face of demands from special interests groups that sought to make it easier for parents to disinherit their children."

Mr. Shabot plans to attend the Commission meeting on Friday to explain why he thinks the Commission should study the possibility of enacting forced heirship legislation in California.

Respectfully submitted,

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25 July 2005

Mr. Sam Shabot
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Dear Mr. Shabot:

Thank you for your recent letters and phone calls regarding your interest in my working paper, *Empire of Personal Desire: American Law and the Destruction of Communal Forms of Meaning*. I hope to get the piece published sometime this fall. I will let you know once I hear back from a journal.

In this article, I demonstrate how the extraordinary deference American law gives to individual freedom can be particularly destabilizing to communities and legal systems that place a high value on communal interdependence and social solidarity, and I argue that this raises important questions about social justice and human flourishing in the ongoing domination of world affairs by the United States. In order to make my case, I describe how an ancient legal principle, long in use in Louisiana and common throughout the world, was subverted by an American legal system and culture unwilling to promote communal ownership of goods and property within the family.

I also argue that because American culture does not understand the human person as an individual situated in community with others, basic principles of American law proceed from understandings of personhood that tend to undermine a sense of responsibility across the generations. The social or communal value of collective goods tends to be lost in an American society that judges the value of legal rules and concepts based primarily on their ability to enhance individual well-being.

It was these American cultural values that undermined the legal concept of the *legitime* in the state of Louisiana. For close to two-hundred years, Louisiana was the only state in the United States that gave all children (regardless of age but subject to some limited exceptions) a permanent claim on a portion of their parents' estates by limiting the amount of an estate that could be disposed of by will. The *legitime*, or some variation, is in place in most of the world's legal systems, and it makes it impossible (or extremely difficult) for parents to disinherit their direct descendants. In the late 1990s, this legal concept was severely undermined in Louisiana in the face of demands from special interests groups that sought to make it easier for parents to

disinherit their children. The *legitime* now only applies to children twenty-three years of age or younger, and given how common divorces and multiple marriages have become, many children in Louisiana are now facing situations, long common in other parts of the country, in which they are disinherited in favor of spouses and/or children of second or third marriages.

The *legitime* can be traced back to Roman law, and for centuries it has been a part of the legal systems of nations that embrace the civil law tradition, such as Germany, France and Spain. Whereas the civil law world has generally viewed family unity as a key theoretical underpinning of inheritance law, Anglo-American law has placed testamentary freedom, or the right of the individual owner of property to control bequests, at the center of its understanding of the rules relating to wills and trusts. A recent event in the popular press provides an excellent example of how the *legitime* protects the rights of children who would often be denied an inheritance in the Anglo-American legal system.

It was recently revealed that Prince Albert of Monaco, who is unmarried and will soon ascend to the throne of the principality, is the father of a son. The child's mother is a Frenchwoman of Togolese descent who was involved in a long-term relationship with the Prince. Under French law, which controls inheritance in Monaco, the child is now entitled to the one-half of the Prince's estate that is reserved to his direct descendants. The child may get less than this amount if the Prince has more children–for instance, half of this share if there is a second child--but his right to inherit from this fixed share is permanent. In the United States, it would not be too difficult for a wealthy man to limit his financial commitment to a child of a similar union to economic support during the child's minority.

In my article, I demonstrate how the American commitment to the principle of testamentary freedom as opposed to the concept of the *legitime*, reveals key information about American cultural values and economic priorities. The implication of the American rule is that one's commitment to a child is a choice and that the community of the family can be constructed or deconstructed at will. The *legitime* assumes that in the typical situation, the parent/child bond is permanent, and that assets will be shared among the generations. The American rejection of the concept of the *legitime* is also one very important example of how the American view of the family, and the individual's relationship to it, diverges dramatically from the views held in the cultures of many of our key political and economic allies, not to mention the more numerous examples in the developing world.

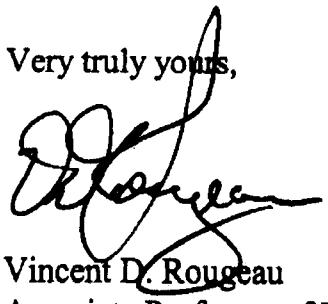
I think this cultural and legal difference is quite significant. Although the relative uniqueness of American law's commitment to testamentary freedom has not caused much concern in the United States, it has not gone unnoticed by commentators in other parts of the world. As we struggle to understand why there is growing (and often violent) resistence abroad to American-led economic globalization, political leadership, and social reform, we would do well to take a more critical look at how our cultural and legal norms appear to those in other nations who feel increasing pressure to adopt American legal structures and economic priorities. As a normative matter, is a legal principle like testamentary freedom, which promotes individual desire (or caprice) over family unity and responsibility to children, good for society? Many nations around the world have decided that it is not. The history of the *legitime* in Louisiana

demonstrates how the process of cultural Americanization made the legal principle untenable over time because American culture does not place a high value on the maintenance of strong ties between parents and adult children. This lends at least some credence to the fears abroad about the potentially destructive effects of American cultural and economic dominance on societies that value strong extended family relationships.

I understand that you have been attempting to discuss some of the drawbacks of the Anglo-American system of testamentary freedom with legislators in the state of California. Like Louisiana, California traces important aspects of its legal heritage, such as community property, to the civil law tradition of Spain. My guess is that the *legitime* operated in California when it was part of Mexico, and it would be interesting to research how the change to the testamentary system of Anglo-American law took place. I doubt that it was something sought by the long-term California residents who lived there prior to statehood. Most likely, it was demanded by Anglo-American settlers from the East. In any event, legal historians at some of the California law schools might be able to offer some historical context to this discussion that would demonstrate that the *legitime* is hardly a "foreign" concept to California law.

I hope this discussion is of some help to you. Obviously, no legal rule is perfect and every choice we make comes with some drawbacks. Nevertheless, I do think the benefits of alternative legal approaches to problems often do not get the hearings they deserve in the United States, even when these approaches are quite common throughout the rest of the world . Good luck with your efforts.

Very truly yours,



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